

64281-2

64281-2

No. 64281-2

COURT OF APPEALS  
DIVISION 1  
OF THE STATE OF WASHINGTON

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MARIO LaPLANT and CRYSTA PENNAMEN,

Plaintiffs/Respondents,

SNOHOMISH COUNTY

Defendant/Appellant

FILED  
COURT OF APPEALS  
DIVISION 1  
STATE OF WASHINGTON  
2010 APR 27 AM 10:52

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BRIEF OF RESPONDENT LAPLANT

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Mark Leemon, WSBA #5005  
Leemon + Royer PLLC  
2505 Second Avenue, Suite 610  
Seattle, WA 98121  
(206) 269-1100

ORIGINAL

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## I. SUMMARY OF ARGUMENT

With all due respect to Court Administrator/Clerk Johnson who granted the Motion for Discretionary Review herein, the arguments of appellant make clear that a decision regarding the negligent training and supervision claims herein is a fact-dependent one, requiring a careful review of the evidence on a case by case basis, and that the record at this pre-trial stage is not sufficiently complete for this Court to make a clear and/or effective ruling.

Nothing could make this fact clearer than two Court of appeals opinions in roughly similar cases. *Gilliam v. DSHS*, 89 Wn. App. 569, 950 P.2d 20 (1998); *Joyce v. State, Dept. of Corrections*, 75 P.3d 548, 564, 116 Wash.App. 569, 599 (2003), Aff'd in Part, Rev'd in Part on other gds. by *Joyce v. State, Dept. of Corrections*, 155 Wash.2d 306, 119 P.3d 825 ( 2005) In *Gilliam*, a claim for negligent investigation of child abuse, the trial court dismissed the plaintiff's claims for negligent employee supervision at the end of plaintiff's case, prior to granting the defendant a directed verdict on immunity grounds. In *Joyce*, a claim for negligent community supervision, the trial court refused

to dismiss the negligent supervision of employees claim, and instructed the jury on its elements. What these seemingly conflicting trial court rulings have in common is that they were both upheld on appeal. In both cases the appellate court had the benefit of the entire presentation of the plaintiff's evidence, and in each case the trial court decision was deemed not to be reversible error.

One of the key issues here, barely mentioned by Appellants is whether the claims brought by plaintiff are for breach of the same duties or for independent duties owed by the officers and by the department itself. Respondent urges the Court that the duties are distinct, and that both should be able to be presented to the jury.

As Appellant's brief makes clear, its main concern is not necessarily with what plaintiffs' claims are called. Rather it is with the introduction of prejudicial evidence, never identified, which it claims might wrongly be admitted unless the negligent training and supervision claim is dismissed. This is nothing but the purest of speculation, and by definition at this point cannot take into account all the factors a trial judge must consider in ruling on the admissibility of evidence. This is not a decision that can be made

in a vacuum, and certainly provides no. reason for dismissal of an otherwise valid claim.

## **II. STATEMENT OF FACTS**

### **A. Statement of procedural facts.**

Plaintiff agrees that the timeline of the court's actions relevant to this appeal is accurately set out in appellant's brief. Plaintiff does not necessarily agree with the accompanying editorial comments. What is clear is that when the Defendant objected to amending the complaint, and when it moved for dismissal of the negligent training claim, it was always framed as being required as a matter of law. Defendant never claimed that there was anything unique about this case that required eliminating the negligent training and supervision claim.

### **B. Facts Supporting Plaintiff's Negligent Training and Supervision Claim**

This case arises out of a police pursuit occurring in the early morning hours of June 23, 2003. Deputy Calnon of the Snohomish County Sheriff's office instituted a pursuit of a car believed to be stolen and pursued the car for several miles at speeds exceeding at times 100 MPH. Officer Calnon could see there were

three occupants, but could not tell their ages, gender or even race. The car, driven by Jonathon Evans, smashed through a low brick wall and then into an apartment building. Evans was ejected from the car and died from his injuries. His passengers suffered severe and permanent injuries.

The Snohomish County Sheriff's department has a pursuit policy under which deputies are supposed to operate. For ease of reference, the pertinent parts of this policy are set out in Appendix A.

This policy by its terms allows pursuit of any suspect for any crime. A deputy is required to terminate a pursuit "whenever the risks of continuing the operation outweigh the danger to the public if the suspect is not immediately apprehended." Likewise, a supervisor is required to terminate a pursuit if, in his judgment, it is "inadvisable". It is obvious that these terms are exceptionally vague and could mean different things to different officers. Plaintiff Penneman retained as an expert Professor Geoffrey Alpert, perhaps the leading researcher in the country about police pursuits and their outcomes. In his deposition, Dr. Alpert described the Snohomish county pursuit policy as an example of the category of the broadest policies, which he termed a discretionary or judgmental policy. He testified that, although in general he disfavors such policies, it is most

crucial in the case of such policies to have thorough and clear training, so that in essence the decision on pursuit is originating from the Department, and not left up to the on the spot judgment of officers on the street. CP 172.

During the course of discovery, it appeared that there is no clear training as to what factors must be considered, or how they are to be weighed in judging whether the risks of continuing the operation outweigh the danger to the public if the suspect is not immediately apprehended. See, e.g., CP 118-119. There is a conflict among Sheriff's office officers as to whether the likelihood of harm to adult passengers in a pursued car is "a risk of continuing the operation" which must be considered. CP 53-54. Nor is there any training about whether the "danger to the public if the suspect is not immediately apprehended" is any different when the driver being pursued is suspected of a property felony as opposed to a crime of violence. The immediate supervisor responsible for terminating the pursuit herein testified that he had no training as a supervisor with regard to the obligations of a supervisor with regard to terminating or approving pursuits. CP 119. The term "inadvisable" is nowhere further defined, nor is there any specific training for supervisors in how to come to the decision of whether a pursuit is advisable or not. Because of this, the

“policy” reflects the views of each individual member of the Department, rather than a directive from the department itself. CP 172.

### **III. AUTHORITY AND ARGUMENT**

#### **A. Standard of Review.**

Respondent agrees that questions of law are reviewed de novo. *Sherman v. State*, 128 Wn.2d 164, 183, 905 P.2d 355 (1995). This matter has always been framed as a matter of law, and in none of its pleadings has the County pointed to any facts necessary to the Court’s determination. As such, their motion for summary judgment was in fact a motion to dismiss under CR 12(b)(6). Dismissal for failure to state a claim is appropriate only when it appears beyond doubt that the claimant can prove no set of facts, consistent with the complaint, which would justify recovery. *San Juan County v. No New Gas Tax* 160 Wash.2d 141, 157 P.3d 831 (2007).

#### **B. Under the facts of this case, the training and supervision claim is not redundant.**

Appellant relies primarily for its position on *Gilliam v. DSHS*, 89 Wash. App. 569, 950 P.2d 20 (1998). That reliance is misplaced, and ignores both the context of the decision and the

clear language of the opinions. The *Gilliam* case involved negligent investigation of child abuse. The supervision that was being complained of was supervision by the child care worker's supervisors of the actions of the worker during the course of the investigation. The action that was being complained of was a negligent and unnecessarily slow investigation. The supervision of the caseworker could only be brought into question if the investigation were unnecessarily slow and negligent. In response the Court stated, "**Under these circumstances** a cause of action for negligent supervision is redundant." *Id* at 585. (Emphasis added.) The Court found that it would not be error to dismiss the claim. (The Court did not hold, nor does Appellant cite any case for the proposition that it would be error not to.)

The situation here is quite different. While the case of course concerns whether the deputy conducting the pursuit was negligent, his training and supervision prior to the day of the pursuit is equally important. This is primarily because of the central position the Department's pursuit policy has in this case. As indicated above, this policy is extremely broad and vague. It could mean different things to different people depending on how it was interpreted and how the officers were trained to apply it.

The duty owed by the driver of an emergency vehicle is established by RCW 46.61.035. (Appendix B.) That statute requires that the driver of an emergency vehicle has a duty to operate his vehicle "with due regard for the safety of all persons." RCW 46.61.035(4). Additionally, the statute allows an emergency vehicle operator to exceed posted speed limits "so long as he does not endanger life or property." RCW 46.61.035(2)(c). The Supreme Court has held that this statute creates a duty which may be enforced by a civil suit for damages. *Mason v. Bitton*, 85 W.2d 321, 325, 534 P.2d 1360 (1975). In such a suit, the driver is judged by a negligence standard. *Brown v. Spokane County Fire Protection District No. 1*, 100 W.2d 188, 193, 668 P.2d 571 (1983).

Accordingly, the jury will be instructed pursuant to WPI 71.01 Emergency Vehicles -- Privileges When Authorized as well as WPI 10.01, Negligence -- Adult -- Definition , and WPI 10.02 Ordinary Care. (Appendix C.) WPI 71.01 states, "The duty to drive with due regard for the safety of all persons means a duty to exercise ordinary care under all the circumstances." According to WPI 10.01, the jury will be told that negligence is "the failure to exercise ordinary care. It is the doing of some act that a reasonably

careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.” Finally, Ordinary care is defined by WPI 10.02 as “the care a reasonably careful person would exercise under the same or similar circumstances.”

Among the circumstances Deputy Calnon faced was the requirement to follow the pursuit policy despite the fact that his training was insufficient to allow him to make the judgments required by the policy. A jury could find that Deputy Calnon was acting as a reasonable person under the circumstances. The same could be said for Master Deputy Swanson, the supervisor who has the authority to terminate the pursuit and did not do so. Although Plaintiffs believe that it was negligent not to terminate the pursuit, a jury could find that he was acting as a reasonably careful person, given the fact that he had not been trained as to what “inadvisable” means, did not know whether the safety of adult passengers of the pursued car was a factor to be considered, and did not know how to weigh any of the factors regarding pursuits of which he was aware.

The existence of a specific written policy gives the officers reason to act as they do. The duty to train them and to make sure the policy is followed so as to protect life and property is on the Sheriff's Department.

A review of the Supreme Court opinion in *Joyce v. State, supra* indicates why both claims may be properly heard here. In *Joyce*, DOC directives were admitted showing, for example that violations of the conditions of supervision had to be reported within 30 days. The jury was instructed that these directives established legal requirements. The Supreme Court held this was error, and that the jury should have been told that the directives may be evidence that is relevant to negligence, but that they are not conclusive on the issue.

This issue is critical here. The County has a pursuit policy which is sure to be central evidence in this case. The jury will be instructed that this policy may be considered as evidence in determining negligence. RCW 5.40.050, WPI 60.03. However, as indicated in support of plaintiff's motion to amend the complaint, there is evidence that Deputy Calnon and MPD Swenson understand the policy differently than did the Sheriff and the training officers of the department, and that this difference in understanding was not the fault of the Deputies, but of the Department.

In *Joyce* the Court of Appeals held that at most the submission of the negligent training supervision and hiring claim was redundant, and did

not require reversal. Significantly, the State there did not allege the introduction of any evidence in support of the negligent supervision claim not admissible in the underlying claim of negligence of the community corrections officer involved.

Defendant concedes that an employer has an independent duty to train and supervise its employees in a way to avoid harm to others arising out of actions not taken outside the course of the employer's business, and thus not amenable to *respondeat superior* liability. *Niece v. Elmview Group Home*, 131 Wn.2d 39, 48,929 P.2d 420 (1997). Defendant does not explain, however, why or how this duty disappears in the case of actions taken in the course of the employer's business. While in many cases it may not matter because the employer can be liable for *respondeat superior* liability, that is not the same as saying there is no duty. To the contrary, the need for enforcement of such a duty would seemingly be greater in the case of an employment in which the employee can cause harm to others within the scope of his employment.

Taking an example for this case, plaintiffs allege that Deputy Calnon was negligent in instituting and maintaining the pursuit. They also allege that his supervisor, Master Deputy Swenson was negligent for not terminating it. No one argues that there is any "redundancy" in proving the negligence of each of these officers or that the county cannot be liable

on the basis of Swenson's negligence. It is no great analytical leap to say that the Department itself has an independent duty to make sure its officers are properly trained in pursuit decisions, and that breach of this duty is negligence for which the County would be liable.

Defendant argues that *respondeat superior liability* and independent liability for negligent training are somehow mutually exclusive. This is of course not true. Undoubtedly many cases of employees acting negligently are caused by faulty training. This question is whether under all circumstances it is error to let the plaintiff prove both. Defendant has provided no authority for this proposition. It may be that the theory that Calnon was negligent and the theory that the training was negligent are to some degree in conflict. However, CR 8(e)(2) expressly allows the plaintiff to set out claims alternately, and to make as many claims as he has regardless of their consistency.

Defendant City of Kent made the exact same argument recently to U.S. District Judge John Coughenour in the case of *Tubar v. Clift*, 2008 WL 5142932 (W.D.Wash. Dec 05, 2008) (NO. C05-1154-JCC) denied the motion, and distinguished Gilliam, noting that the Plaintiff was entitled to bring an independent action against the City, and that the City could not prevent this by simply admitting that the officer was acting within the

scope of his employment. A copy of Judge Coughenour's order is attached hereto as Appendix D.<sup>1</sup>

Finally looked at another way, in the *Gilliam* case a verdict stating that the caseworker was not negligent, but that her supervision was negligent and that that negligence was a proximate cause of harm would be inconsistent. Under the circumstances here, a jury could find that Deputies Calnon and Swenson were reasonably careful under the circumstances, in light of the policy they were given to follow and the absence of training on that policy. They could also find that the County was negligent in training its officers, that this negligence essentially made it impossible for officers to know when to pursue and when not to, and that this negligence was a proximate cause of entirely foreseeable harm. There would be no inconsistency in such verdicts.

**C. Appellant has not cited one scintilla of evidence that would be wrongly admitted if Plaintiffs were allowed to prove negligent training and supervision.**

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<sup>1</sup> Mr. Johnson in his ruling noted that Judge Coughenour pointed out that the Plaintiffs there did not bring a claim against the individual officers. Since Defendant here admits that all relevant actors were acting in the course and scope of their employment, plaintiffs have not and will not be moving to identify any of the John doe defendants, and will be proceeding only against the County.

Because a jury would not be allowed to impose multiple damages under any circumstances, the only real harm Appellant can cite in allowing the negligent training claim to go forward is that somehow the trial judge would wrongly admit evidence that would be relevant with regard to one claim but not admissible in the other. Appellant, however, cites no specific evidence that would fit in this category.

Certainly some evidence of negligent training would be relevant in determining whether the Deputies in question here were negligent. For example, suppose it could be shown that Deputy Calnon was permitted to serve as a police officer without any training whatsoever. Wouldn't this make more likely the fact that his actions would be negligent? Does Appellant really mean to suggest that the officer's training is irrelevant, and that therefore the County does not intend to introduce anything on direct to show how well trained he is? That's doubtful.

Even as to prior bad acts, some might be admissible. For example, suppose it could be shown that the Officer has a common plan to pursue fleeing Hispanics in a fashion that would be likely to cause them injury. This might well be admissible in a case involving the pursuit of a Hispanic driver.

What Appellant is asking this court to do is to prejudge and micromanage the trial judge's rulings on the admissibility of evidence, a

matter appellate courts have countless times stated is peculiarly within the trial court's discretion. Appellant is asking the Court to do this without the benefit of all the other evidence and without the context that the trial judge would have. Ironically, the last time the County made this motion to dismiss was at a hearing scheduled to rule on Defendant's motions in limine. CP 5-8. The trial judge did so, and Defendant has not pointed to one such order of the court that it claims was in error. There is no reason at all to prejudge Judge McKeeman's ability to rule properly on the admissibility of evidence, especially not based merely on Appellant's fear that he may do so.

#### **IV. CONCLUSION**

Plaintiff's complaint states and the evidence supports the violation of two distinct duties – the duty of the operator of an emergency vehicle to drive with reasonable care under the circumstances, and the duty of an employer to use reasonable care in training and supervising employees so that they don't foreseeably cause harm to others. This latter duty does not disappear simply because the defendant employer chooses to admit that the actions of an employee were done in the course of and in furtherance of the employer's business. Whether both can be proved, and whether both can be submitted to the jury depend on the particular circumstances of the case, and the evidence submitted in support of each and/or both. All

cases heretofore discussing this issue have been decided after all of the plaintiff's evidence is in, and the court is thus in a position to assess these matters.

This pretrial review at Defendant's instance does not have the benefit of the trial court's view of and/or rulings on the evidence. It asks this court to establish a blanket rule where none is appropriate. No evidence supports the notion that the trial Court herein has or will make reversible error in ruling on evidence. The trial Court should be affirmed.

Respectfully submitted this 26th Day of April, 2010,

LEEMON + ROYER, PLLC



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Mark Leemon, WSBA #5005  
Attorney for Respondent

## DECLARATION OF SERVICE

I, Emily Kivi, certify under penalty of perjury under the laws of the State of Washington that, on April 26, 2010 I caused the following documents to be served on the person listed below in the manner shown:

1. Brief of Respondent LaPlant.

### *VIA U.S. MAIL*

Thomas Schwanz  
Admin East 7th Floor, M/S 504  
3000 Rockefeller Ave.  
Everett, WA 98201-4060

Allen M. Ressler, Esq.  
821 Second Avenue, Suite 2200  
Seattle, WA 98104

I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

Signed at Seattle, Washington, this 26<sup>th</sup> day of April, 2010



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Emily D. Kivi

APPENDIX A

SNOHOMISH COUNTY SHERIFF'S OFFICE PURSUIT POLICY

## **9.01/400.00 VEHICLE PURSUITS: GENERAL POLICY**

I. Pursuits shall be governed by all laws and policies applicable to any other emergency response. However, due to the high risks associated with pursuits, additional policies and procedures are required.

### **9.01/400.5 VEHICLE PURSUITS: POLICY**

1. The purpose of a vehicle pursuit is to apprehend a suspect(s) who willfully refuses to stop when signaled to do so by a law enforcement officer.

2. Deputies are **required to terminate** any pursuit whenever **the risks of continuing the operation outweigh the danger to the public if the suspect is not immediately apprehended**. Thus, deputies are expected to consider the risks involved after initiating a pursuit to determine whether the pursuit appears at the time to be **worth continuing**.

...

### **9.01/400.10 PURSUITS: INITIATING PURSUITS**

1. Any deputy operating an authorized emergency vehicle **may initiate** a pursuit whenever **a suspect** clearly exhibits an intention to avoid arrest by using a vehicle to flee, and **should take into consideration the factors** listed in section 9.01/300.15 of this volume.

2. Initiating pursuits in order to apprehend felony criminal suspects is viewed as **more justifiable** than pursuits of misdemeanor suspects, therefore all pursuits shall be **immediately evaluated** by a field supervisor or watch commander for continuance in accordance with the standards set forth in this policy. Any decision to continue the pursuit should not be based solely on the fact that the act of eluding a police officer is a separate felony.

### **9.01/300.15 EMERGENCY VEHICLE RESPONSE: VEHICLE SPEED**

1. In non-pursuit emergency responses, it is imperative that the deputy proceed, in the most expeditious and safe manner possible, utilizing emergency lights and siren as may be necessary. The actual speed should be dictated by factors such as:

- Nature of Call.
- Traffic, weather and road conditions.
- Driver familiarity with the area.
- Sheriff's vehicle type and condition.
- Pedestrian traffic.
- Time of day.
- Geographic location.
- Personal ability, experience, and training.
- Visibility and illumination

**9.01/401.15 Pursuits: Supervisor Responsibility**

I. The current field supervisor of the precinct within whose boundaries the pursuit is initiated shall have supervisory responsibility of the pursuit and any Sheriff's Office personnel involved. He **shall terminate** the pursuit if, in his judgment, it is **inadvisable** to continue. The supervisor may also direct or redirect the primary or secondary units in the course of the pursuit.  
(Emphasis added.)

APPENDIX B

STATUTES PERTINENT TO POLICE PURSUIT

**RCW 46.61.035**

**Authorized emergency vehicles.**

(1) The driver of an authorized emergency vehicle, when responding to an emergency call or when in the pursuit of an actual or suspected violator of the law or when responding to but not upon returning from a fire alarm, may exercise the privileges set forth in this section, but subject to the conditions herein stated.

(2) The driver of an authorized emergency vehicle may:

(a) Park or stand, irrespective of the provisions of this chapter;

(b) Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation;

(c) Exceed the maximum speed limits so long as he does not endanger life or property;

(d) Disregard regulations governing direction of movement or turning in specified directions.

(3) The exemptions herein granted to an authorized emergency vehicle shall apply only when such vehicle is making use of visual signals meeting the requirements of RCW 46.37.190, except that: (a) An authorized emergency vehicle operated as a police vehicle need not be equipped with or display a red light visible from in front of the vehicle; (b) authorized emergency vehicles shall use audible signals when necessary to warn others of the emergency nature of the situation but in no case shall they be required to use audible signals while parked or standing.

(4) The foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the **duty to drive with due regard for the safety of all persons**, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others.

(Emphasis added)

APPENDIX C

PERTINENT WASHINGTON PATTERN INSTRUCTIONS

## **WPI 71.01 Emergency Vehicles—Privileges When Authorized**

[[Plaintiff's] [Defendant's] vehicle was an authorized emergency vehicle.] When an authorized emergency vehicle is [responding to an emergency call] [in the pursuit of an actual or suspected violator of the law] [and if an authorized signal is being sounded] [and if the special lights on the vehicle are in operation] [when and to the extent reasonably necessary to warn pedestrians and other drivers of its approach,] the driver of the emergency vehicle is privileged:

- (a) To park or stand, irrespective of the provisions of the law applicable to motorists generally;
- (b) To proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation;
- (c) To exceed the maximum speed limits so long as life or property is not endangered;
- (d) To disregard regulations governing direction of movement or turning in specified directions.

These privileges granted to an authorized emergency vehicle **do not relieve its driver from the duty to drive with due regard for the safety of all persons under all of the circumstances**, including the circumstances of the emergency. [Furthermore, these privileges do not protect the driver from the consequences of any reckless disregard of the safety of others.]

**The duty to drive with due regard for the safety of all persons means a duty to exercise ordinary care under all of the circumstances.**

Except for the privileges enumerated and the conditions here set forth when those privileges may be exercised, the driver of an authorized emergency vehicle is subject to the laws applicable to other drivers. (Emphasis added.)

Note on Use

...

Always use WPI 10.01, Negligence—Adult—Definition, and WPI 10.02, Ordinary Care—Adult—Definition, with this instruction.

## **WPI 10.01 Negligence—Adult—Definition**

Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.

## **WPI 10.02 Ordinary Care—Adult—Definition**

Ordinary care means the care a reasonably careful person would exercise under the same or similar circumstances.

APPENDIX D

COURT'S DECISION DENYING SUMMARY JUDGMENT IN

*Tubar v. Clift*, 2008 WL 5142932 (W.D.Wash. Dec 05, 2008) (NO. C05-1154-JCC)



**H**

Only the Westlaw citation is currently available.

United States District Court, W.D. Washington,  
 at Seattle.

Nicomedes TUBAR, III, Plaintiff,

v.

Jason CLIFT; and the City of Kent, Washington, a  
 municipal corporation,  
 Defendants.

No. C05-1154-JCC.

Dec. 5, 2008.

Timothy K. Ford, Joseph R. Shaeffer, Macdonald,  
Hoague & Bayless, Seattle, WA, for Plaintiff.

Mary Ann McConaughy, Steven L. Thorsrud,  
Keating, Bucklin & McCormack, Seattle, WA, for  
 Defendants.

## ORDER

JOHN C. COUGHENOUR, District Judge.

\*1 This matter comes before the Court on Defendant City of Kent's Motion for Partial Summary Judgment (Dkt. No. 188), Plaintiff's Opposition (Dkt. No. 211), Defendant's Reply (Dkt. No. 215), Plaintiff's Motion for Partial Summary Judgment (Dkt. No. 190), Defendants' Opposition (Dkt. No. 205), and Plaintiff's Reply (Dkt. No. 219). The Court, having carefully considered all of the papers submitted and determined that oral argument is not necessary, hereby DENIES the City of Kent's motion and DENIES Plaintiff's motion, and rules as follows.

**I. BACKGROUND AND FACTS**

This is a civil rights lawsuit arising from a shooting incident that occurred on June 26, 2003. Plaintiff Nicomedes Tubar filed this action on June 24, 2005, against Officer Jason Clift in his individual capacity and the City of Kent (the "City") for damages arising from an alleged violation of his civil rights. Officer Clift then sought summary judgment on the basis of qualified immunity (Dkt. No. 30). In denying Clift's motion, the Court recounted the following facts:

On June 25, 2003, Defendant Jason Clift, a City of Kent Police Officer, discovered a stolen 2001 Kia automobile in the parking lot of Plaintiff's apartment building. Defendant Clift decided to watch the vehicle because he believed that it had been driven recently. He placed a "rat trap" [FN1] under one of the tires of the stolen vehicle, moved his patrol car out of sight, and hid in the bushes to await the driver's return. Approximately thirty minutes later, just after midnight on June 26, 2003, Defendant Clift observed Plaintiff, along with driver Heather Morehouse, exit the apartment building and enter the stolen vehicle. As Ms. Morehouse began backing the vehicle out of the parking spot, the rat trap punctured the vehicle's tires. At the same time, Defendant Clift emerged from the bushes with his flashlight and gun and announced that he was a police officer. Plaintiff and Ms. Morehouse did not hear this announcement nor realize that Defendant Clift was a police officer, but Defendant Clift thought that the vehicle occupants perceived him.

[FN1]. A rat trap is a mechanical device used to deflate tires.

According to Plaintiff, Ms. Morehouse began driving toward the only exit at a "normal" speed--approximately 15 miles per hour according to both parties as well as supporting testimony that indicates that the vehicle was not going very fast. Ms. Morehouse steered towards the exit of the parking lot, in what Plaintiff characterizes as a "steady right turn." In contrast, Defendant Clift maintains that it was a "sharp U-Turn" to the right. The tire puncture due to the rat trap caused the rim of the front passenger tire to mark the pavement as the vehicle moved, providing evidence of the Kia's path consistent with a steady right turn. Nevertheless, Defendant Clift's version of events is that Ms. Morehouse steered the car toward him, accelerated, and put him in fear for his life. However, Plaintiff claims that the car decelerated as events unfolded and that Ms. Morehouse consistently steered toward the parking lot exit and never accelerated toward Defendant Clift in an attempt to hit him. While Defendant Clift originally claimed that the car "swerved" toward him, none of the evidence

indicates a "swerve" and Defendant Clift now seems to have retreated from that theory. Nevertheless, during the vehicle's undisputed curved path, it is clear that at some point the car was headed directly toward where Defendant Clift was standing, though the parties dispute how long this was.

\*2 As the car approached the parking lot exit, Defendant Clift fired his weapon at the vehicle three times. The first two bullets entered the hood and front windshield of the vehicle but did not strike either Ms. Morehouse or Plaintiff. Defendant Clift fired his third shot as the vehicle was passing him. This third bullet entered through the driver's side window and struck Plaintiff in the upper left shoulder area. According to Plaintiff's expert, by the time the third shot was fired, the Kia was moving at about 6 miles per hour and visibly decelerating.

It is undisputed that the three shots were fired in a matter of seconds. One witness described the succession of shots as "'bang, bang' (pause) 'bang.'" It is undisputed that the third shot is the one that hit Plaintiff and that it came through the side of the car as it was passing Defendant Clift.

(Sept. 22 Order 1-3 (Dkt. No. 156) (record citations omitted).)

In ruling on Officer Clift's motion for summary judgment, the Court determined that the evidence, viewed in Plaintiff's favor, sufficiently established that Clift's use of deadly force was objectively unreasonable in violation of the Fourth Amendment. (*Id.* at 8-9.) At minimum, the Court found that Clift's firing of the third shot was objectively unreasonable because any arguable threat to his safety had ceased at the time that shot was fired. (*Id.* at 9.) Because the unconstitutionality of such use of deadly force was clearly established, the Court denied Officer Clift's request for qualified immunity. (*Id.* at 9-10.) On appeal, the Ninth Circuit affirmed the denial of qualified immunity and found that, taking Plaintiff's allegations as true, "no reasonable officer could have thought that the use of deadly force was reasonable under the circumstances." (Mandate 7 (Dkt. No. 179-2).)

Officer Clift was also involved in two other shooting incidents prior to the June 2003 incident. The first incident occurred in November 2000 and involved Guadalupe Martinez, who was stopped in heavy traffic after leading police on a high speed chase. (Weissich Decl. ¶ 4 (Dkt. No. 57 at 1).) Witnesses

stated that Martinez emerged from the vehicle with what appeared to be a large-caliber handgun, which she pointed at Officer Clift, who had approached the driver's door (*Id.* at ¶ 5.) Both Clift and another Kent officer fired their weapons, and Martinez was killed. (Mot. 6 (Dkt. No. 188).) Subsequently, it was determined that the gun Martinez displayed was a pellet gun. (*Id.*) The Auburn Police Department investigated the circumstances of the shooting and concluded that Officer Clift shot Martinez in self-defense. (Martinez Investigation 4 (Dkt. No. 57 at 4-7).) Thereafter, Kent Police Chief Ed Crawford found that Clift's use of force was justified and officially "exonerated" him of any wrongdoing. (2001 Exoneration (Dkt. No. 212-2 at 16).)

The second shooting incident occurred in May 2002 following a high speed chase. (Jackson Investigation 1 (Dkt. No. 57 at 8).) Officers had stopped a vehicle because the driver, Eric Jackson, had an outstanding felony warrant. (*Id.*) The vehicle also had a female passenger, Kristina Howe. (*Id.*) Jackson struggled with the officers as they attempted to take him into custody, and he managed to escape back to his vehicle where he sped away. (*Id.* at 2.) During the chase, Officer Clift employed a Pursuit Intervention Tactic, which involved impacting the fleeing vehicle and forcing it to come to a stop. (*See id.* at 3.) As a Federal Way officer approached the stopped vehicle, Jackson apparently revved the engine. (*Id.*) Clift and two other officers claimed that Jackson was attempting to run over the approaching officer. (*Id.* at 3-4.) The three officers then fired their weapons at the vehicle, hitting Jackson and Howe, both of whom suffered non-fatal injuries. (*Id.*; Mot. 7 (Dkt. No. 188).) After an internal review, Chief Crawford again found that Clift's use of force was justified and "exonerated" him. (2002 Exoneration (Dkt. No. 212-2 at 163).)

\*3 As in the two previous shootings, Chief Crawford ultimately exonerated Officer Clift from any wrongdoing in the shooting incident at issue in the instant lawsuit. Immediately after the shooting, Clift gave a brief oral report to his sergeant and was then taken to the Kent police station to meet with his union representative and attorney. (Clark Narrative (Dkt. No. 212-6 at 76).) Chief Crawford then placed Clift on administrative leave and referred the incident to the Auburn Police Department for an investigation. (Miller Decl. ¶ 17 (Dkt. No. 135 at 5).) The Chief

also sent Clift to a psychologist for an evaluation of his fitness to return to duty. (*Id.*) After being ordered by the Deputy Police Chief to provide a statement, Clift submitted a written statement of the incident on July 8, 2003, nearly two weeks after the incident. (Internal Review 5 (Dkt. No. 212-2 at 122).) On July 10, 2003, Clift gave a recorded interview to Auburn investigators in the presence of his attorney. (*Id.*) Subsequently, the Kent Police Department conducted its own internal review of Officer Clift's use of deadly force. (*See id.*) The internal review noted that Clift had not submitted a Use of Force Report as required, but concluded that he had acted in compliance with Police Department policies in discharging his firearm. (*Id.* at 6-8.) Specifically, the internal review found that Clift properly employed deadly force upon believing that he was in immediate danger of death or serious injury. (*Id.* at 6.) Thereafter, Chief Crawford found that Officer Clift was "justified, acted lawfully, properly, and within grounds of accepted police conduct" in using deadly force, and therefore, Clift was "exonerated." (2004 Exoneration (Dkt. No. 212-2 at 161).)

On June 24, 2005, Plaintiff brought this lawsuit against the City of Kent and Officer Clift, alleging violation of his civil rights under 42 U.S.C. section 1983, along with supplemental state law claims for negligent hiring, training, supervision, and retention. (Compl.(Dkt. No. 1).) After the Ninth Circuit affirmed this Court's denial of qualified immunity for Officer Clift, both parties filed cross-motions for partial summary judgment. The City filed a Motion for Partial Summary Judgment on Civil Rights Municipal Liability and Negligence Claims (Dkt. No. 188), and Plaintiff filed a Motion for Partial Summary Judgment that Defendants are Liable for Unreasonable Seizure (Dkt. No. 190).

## II. ANALYSIS

### A. Legal Standard

Summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In determining whether an issue of fact exists, the Court must view all evidence in the light most favorable to the nonmoving party and draw all reasonable

inferences in that party's favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-50, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Bagdadi v. Nazar, 84 F.3d 1194, 1197 (9th Cir.1996). A genuine issue of material fact exists where there is sufficient evidence for a reasonable factfinder to find for the nonmoving party. Anderson, 477 U.S. at 248. The inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-52. The moving party bears the initial burden of showing that there is no evidence which supports an element essential to the nonmovant's claim. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the movant has met this burden, the nonmoving party then must show that there is a genuine issue for trial. Anderson, 477 U.S. at 250. If the nonmoving party fails to establish the existence of a genuine issue of material fact, "the moving party is entitled to judgment as a matter of law." Celotex, 477 U.S. at 323-24.

### B. The City of Kent's Motion for Partial Summary Judgment

\*4 Defendant requests summary judgment dismissal of Plaintiff's constitutional claims against the City of Kent, arguing that Plaintiff has failed to establish the necessary elements for municipal liability. (City's Mot. 1 (Dkt. No. 188).) Defendant also argues that Plaintiff's state law claims against the City for negligent hiring, training, supervision, and retention should be dismissed.

#### 1. Constitutional Claims

A municipality may be held liable under 42 U.S.C. section 1983 when a governmental policy or custom inflicts a constitutional injury, but it may not be held liable under a *respondeat superior* theory. Monel v. Dep't of Social Servs., 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). A plaintiff can establish municipal liability under section 1983 in one of three ways. Gillette v. Delmore, 979 F.2d 1342, 1346 (9th Cir.1992). "First, the plaintiff may prove that a city employee committed the alleged constitutional violation pursuant to a formal governmental policy or a longstanding practice or custom which constitutes the standard operating procedure of the local governmental entity." *Id.* (citing Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 737, 109 S.Ct. 2702, 105

L.Ed.2d 598 (1989)). "Second, the plaintiff may establish that the individual who committed the constitutional tort was an official with 'final policy-making authority' and that the challenged action itself thus constituted an act of official governmental policy." Id. (citing Pembaur v. City of Cincinnati, 475 U.S. 469, 480-81, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986)). "Third, the plaintiff may prove that an official with final policy-making authority ratified a subordinate's unconstitutional decision or action and the basis for it." Id. at 1346-47 (citing City of St. Louis v. Praprotnik, 485 U.S. 112, 127, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988)). Here, Plaintiff argues that the City is liable because it ratified Officer Clift's unconstitutional use of deadly force. Plaintiff contends that the City is also liable because it had a policy or custom of deliberate indifference in the supervision of its officers' use of force thereby causing the constitutional deprivation. (Resp. 12-18 (Dkt. No. 211).)

Under the ratification doctrine, a single decision by a municipal policymaker that ratifies unconstitutional conduct may be sufficient to trigger municipal liability under section 1983. Praprotnik, 485 U.S. at 127; Christie v. Iopa, 176 F.3d 1231, 1238 (9th Cir.1999) ("A municipality also can be liable for an isolated constitutional violation if the final policymaker 'ratified' a subordinate's actions."). In Praprotnik, a plurality of the Supreme Court stated that "if the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision was final." 485 U.S. at 127. To establish ratification, however, the plaintiff must show that "the triggering decision was the product of a conscious, affirmative choice to ratify the conduct in question." Haugen v. Brosseau, 339 F.3d 857, 875 (9th Cir.2003), *rev'd on other grounds*, 543 U.S. 194, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004). Mere acquiescence in a subordinate's discretionary decision is insufficient to establish municipal liability. Gillette, 979 F.2d at 1348. "Ordinarily, ratification is a question for the jury." Christie, 176 F.3d at 1238-39.

\*5 The City argues at-length that this case poses difficult problems of proof and that Plaintiff must show a "direct causal link" between the municipal action and the constitutional violation. (City's Mot. 17-19 (Dkt. No. 188); Reply 2-3 (Dkt. No. 215).) However, the ratification doctrine is based on a municipal policymaker's decision that occurs after the

constitutional deprivation and endorses a subordinate's conduct causing the injury. See Gillette, 979 F.2d at 1348. Under this theory, therefore, plaintiff need only show a causal link between the subordinate's conduct and the constitutional injury. See Trevino v. Gates, 99 F.3d 911, 920 (9th Cir.1996) (ratification occurs where an official adopts and approves of "the acts of others who caused the constitutional violation") (emphasis added).

The Ninth Circuit has found that a policymaker's failure to overrule or discipline the conduct of a subordinate is ordinarily insufficient to establish municipal liability by ratification. See Gillette, 979 F.2d at 1348. In Gillette, the court found that a city manager's "acquiescence in [the plaintiff's] termination" merely amounted to "inaction" that failed to establish ratification under Pembaur and Praprotnik. Id. The fact that the city manager "did not overrule" a subordinate's decision, was insufficient to establish that the city made "a deliberate decision to endorse" the alleged unconstitutional action. Id.

In contrast, the Ninth Circuit has found municipal liability by ratification where "the officials involved adopted and expressly approved of the acts of others who caused the constitutional violation." Trevino, 99 F.3d at 920; see Christie, 176 F.3d at 1240 (finding municipal liability via ratification where prosecutor "affirmatively approved" of alleged constitutional violations). In Fuller v. City of Oakland, 47 F.3d 1522, 1534-35 (9th Cir.1995), the court found section 1983 municipal liability where a police chief ratified a "grossly inadequate" investigation by expressly "approv[ing] both of the propriety of the investigation and the report's conclusions." The police chief's official approval of the thoroughness and conclusions of the internal affairs investigation was sufficient evidence of ratification to foreclose summary judgment dismissal of municipal liability. Id. at 1535; see Larez v. City of Los Angeles, 946 F.2d 630, 646-48 (9th Cir.1991) (finding that police chief ratified an inadequate investigation into allegations of excessive use of force when he signed a letter stating that none of the plaintiff's complaints would be sustained).

Here, Plaintiff has set forth sufficient evidence that the City of Kent, through Police Chief Crawford, [FN2] affirmatively approved of and endorsed Officer Clift's use of deadly force against Plaintiff. Shortly after the incident, Chief Crawford directed

Lieutenant Weissich to conduct an internal investigation of Clift's use of deadly force against Plaintiff. [FN3] (Internal Review 2 (Dkt. No. 212-2 at 119).) Following the use of force review and investigation, the Chief issued a memorandum specifically finding that Officer Clift was "justified, acted lawfully, properly, and within grounds of accepted police conduct" in using deadly force against Plaintiff. (2004 Exoneration (Dkt. No. 212-2 at 161).) Chief Crawford therefore declared that Clift was "exonerated" from any wrongdoing. (*Id.*) There is little doubt that the Chief's final decision to exonerate Clift was chosen from among various other alternatives at his disposal. [FN4] See *Pembaur*, 475 U.S. at 483- 84 (municipal liability may attach where "a deliberate choice to follow a course of action is made from various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question").

FN2. There is little doubt that Chief Crawford had final policymaking authority over the propriety of Officer Clift's conduct. See *Larez*, 946 F.2d at 646 (finding that the police chief is an official policy-maker for the city on police matters); *Fuller*, 47 F.3d at 1534-35 (same). Chief Crawford was therefore an authorized policymaker, whose express "approv[al] [of] a subordinate's decision and the basis for it" could expose the City to liability under the ratification doctrine. See *Praprotnik*, 485 U.S. at 127.

FN3. Although the Auburn Police Department conducted an outside investigation of the incident, Kent Police Department policy required that internal affairs investigate and review Officer Clift's use of force because it resulted in "serious injury or death." (Internal Review 5 (Dkt. No. 212-2 at 122).) Accordingly, the Kent Police Department conducted an internal investigation and was ultimately responsible for determining the legitimacy of Clift's use of deadly force. (*Id.* at 6-8.)

FN4. Chief Crawford, of course, had the authority to take corrective action against Officer Clift if he determined that the use of deadly force was not justified.

\*6 The City argues that Chief Crawford did not knowingly ratify any unconstitutional conduct because he relied on the internal review and Auburn investigation in exonerating Clift. (Reply 7-8 (Dkt. No. 215).) The Court is not persuaded by this argument. Ratification does not require knowledge that the approved conduct is actually unconstitutional. Rather, the policymaker need only have "knowledge of the *alleged* constitutional violation" and its factual basis prior to ratifying the conduct in question. See *Christie*, 176 F.3d at 1239 (emphasis added). Here, the City was well aware of the factual basis behind a potential civil rights suit prior to Chief Crawford's exoneration of Clift. Shortly after the shooting, the City identified Plaintiff Tubar as a potential "claimant" and its insurance defense lawyers began billing hours in preparation for an anticipated civil action, which it captioned "Kent adv. Morehouse/Tubar." (See Ins. Billing (Dkt. No. 212-3 at 35-36).) Thus, at the time Chief Crawford issued the exoneration, he was aware of potential constitutional violations arising from Clift's use of deadly force and was acting as the City official with ultimate responsibility to determine the propriety of such conduct.

Chief Crawford's review of the internal investigation and official exoneration of Officer Clift constituted "affirmative or deliberative conduct" sufficient to create a triable issue as to municipal liability by ratification. See *Christie*, 176 F.3d at 1238-39 (ratification is ordinarily a question of fact for the jury). Unlike in *Gillette*, Chief Crawford did not merely acquiesce or fail to object to unconstitutional conduct. Nor did Chief Crawford merely fail to discipline Officer Clift like the police chief in *Haugen*. Instead, and like the police chief in *Fuller*, Chief Crawford directed an internal affairs investigation and then, at the close of the investigation, explicitly "approved ... of the propriety" of the alleged unconstitutional conduct. See *Fuller*, 47 F.3d at 1534. Chief Crawford therefore made a "conscious, affirmative choice to ratify the conduct in question" by officially exonerating Clift and finding that the use of deadly force was justified. See *id.* at 1535 (finding municipal liability where police chief ratified an internal affairs decision that approved of the an unconstitutional investigation); *Christie*, 176 F.3d at 1240 (finding municipal liability via ratification where prosecutor "affirmatively approved" of unconstitutional prosecution); *Ashley v. Sutton*, 492 F.Supp.2d 1230, 1253 (D.Or.2007) (police chief's declaration that subordinate officer properly followed department policy was

sufficient to establish municipal liability if the jury found the officer employed excessive force).

Plaintiff's ratification theory is further buttressed by evidence of multiple instances in which Chief Crawford had "exonerated" Clift of any wrongdoing in employing the use of deadly force. In *Haugen*, the Ninth Circuit explained that "some pronouncements ratifying a subordinate's action could be tantamount to the announcement or confirmation of a policy for purposes of *Monell*." 339 F.3d at 875. On the facts of that case, the court concluded that the police department's "single failure to discipline" an officer for a shooting incident, by itself, was insufficient to establish affirmative ratification. *Id.* (emphasis added). Here, in contrast, the evidence demonstrates that Chief Crawford not only failed to discipline Clift for two other incidents where he used deadly force, but the Chief also officially exonerated him from any wrongdoing in those shootings. [FN5] (See 2001 Exoneration (Dkt. No. 212- 2 at 16); 2002 Exoneration (Dkt. No. 212-2 at 163).) Plaintiff's experts maintain that the Police Department's exonerations and failure to properly investigate or take corrective action in the previous two shootings is indicative of a general policy of tolerance and ratification for an officer's use of deadly force. (See Reiter Decls. (Dkt. Nos. 212-4, 212-5, & 212-6 at 2-13); Van Blaricom Decl. (Dkt. No. 200).) Plaintiff's experts also claim that the investigation of Plaintiff's shooting was similar to previous investigations of Clift's use of deadly force and failed to accurately assess Clift's conduct and correct it. (See *id.*) In short, Plaintiff's claim for municipal liability by ratification based on more than a "single failure to discipline," and involves multiple instances where the City endorsed and approved of similar conduct. See *Larez*, 946 F.2d at 645-48.

[FN5]. The Court expresses no opinion as to the validity of the exonerations in the previous two shootings, and mentions them merely to illustrate that Plaintiff's ratification theory is based on the Kent Police Department's failure to discipline, and approval of, Officer Clift's use of deadly force in numerous instances.

\*7 Viewed in Plaintiff's favor, the evidence sufficiently establishes that Chief Crawford ratified the alleged unconstitutional conduct when, after reviewing the internal investigation and just like on prior

occasions, he expressly approved of and officially endorsed Officer Clift's actions. Because Chief Crawford had final policymaking authority and ratified Officer Clift's use of deadly force, Plaintiff has sufficiently established ratification to avoid summary judgment on municipal liability for his constitutional claims. [FN6]

[FN6]. Because the record provides sufficient evidence to establish ratification and preclude summary judgment on municipal liability, the Court need not address Plaintiff's alternative argument that the City's deliberate indifference in the supervision of its officers' use of force caused the constitutional deprivation.

## 2. State Law Claims

Plaintiff has also asserted state law claims against the City for negligent hiring, training, supervision, and retention of Officer Clift. The City argues that because it has admitted *respondereat superior*, Plaintiff's state law claims are redundant and precluded under Washington law. (City's Mot. 19-22 (Dkt. No. 188).) The City contends that a negligent supervision claim is an alternative means of establishing employer liability that is not available where, as here, the employer admits that the employee was acting within the scope of employment. (Reply 11 (Dkt. No. 215).) The Court finds that the City's argument is misplaced.

The City relies on *Gilliam v. DSHS*, 89 Wash.App. 569, 950 P.2d 20 (Wash.Ct.App.1998) for the proposition that a negligent supervision theory is not available here. (Mot. 20 (Dkt. No. 188); Reply 11 (Dkt. No. 215).) In *Gilliam*, the State had acknowledged that its employee was acting within the scope of employment and it "would be vicariously liable for her conduct." 950 P.2d at 28. The court determined that, because the plaintiff had asserted a negligence claim against the employee, for which the State had admitted vicarious liability, a claim for negligent supervision would be "redundant." See *id.* If the employee was found liable for negligent investigation, the State would necessarily be vicariously liable under *respondereat superior*. *Id.* In other words, the State's liability was dependant on whether the employee was negligent. Here, there is no such redundancy because Plaintiff has not asserted a negligence

claim against Officer Clift for which the City would be vicariously liable by admission. Instead, Plaintiff claims that the City itself is negligent for breaching its own standard of care with respect to the hiring, supervision, and training of Officer Clift.

The City also argues that allowing the state negligence claim to proceed would be unfairly prejudicial, and cites Logan v. City of Pullman Police, No. CV-04-214-FVS, 2006 WL 994754 (E.D.Wash.2006), for support. However, in Logan, the court dismissed a negligent supervision claim for the same reasons articulated in Gilliam. The court stated: "The reason the Gilliam court held that the plaintiff's claim for negligent supervision against the employer was redundant with the plaintiff's claim for vicarious liability is that both causes of action rested upon a determination that the employee was negligent .... The same is true here." Id. at \*2, 950 P.2d 20 (citation omitted). The court determined that the negligent supervision claim was "unnecessary, irrelevant and prejudicial," only because the plaintiff had also asserted a negligence claim against the employee officers. Id. Again, because Plaintiff has not asserted a negligence claim against Officer Clift, no such risk of redundancy or irrelevance exists here.

\*8 There mere fact that the City admitted that Clift was acting within the scope of his employment does not prevent Plaintiff from asserting state law negligence claims against the City. The scope of employment test operates to limit an employer's *vicarious liability* for torts committed by its employees, but the test does not dictate whether the employer can be held *directly liable* for breaching its own duty of care through negligent hiring, supervision, or training. See Smith v. Sacred Heart Med. Ctr., 144 Wash.App. 537, 184 P.3d 646, 650 (Wash.Ct.App.2008) ("The scope of employment limits an employer's vicarious liability for an employee's torts. It does not, however, limit an employer's liability for a breach of its own duty of care."). The Washington Supreme Court has described this distinction:

Even where an employee is acting outside the scope of employment, the relationship between employer and employee gives rise to a limited duty, owed by an employer to foreseeable victims, to prevent the tasks, premises, or instrumentalities entrusted to an employee from endangering others. This duty gives rise to causes of action for negligent hiring, retention and supervision. Liability un-

der these theories is *analytically distinct and separate from vicarious liability*. These causes of action are based on the theory that "such negligence on the part of the employer is a wrong to [the injured party], entirely independent of the liability of the employer under the doctrine of respondeat superior."

Niece v. Elmview Group Home, 131 Wash.2d 39, 929 P.2d 420, 426 (Wash.1997) (emphasis added) (alteration in original) (citation omitted). Thus, regardless of whether an employee was acting within the scope of employment, employers have an independent duty to prevent their employees from harming foreseeable victims. See id. The City cannot preclude a claim for a breach of its duty of care merely by admitting that Officer Clift was acting within the scope of employment at the time of the Plaintiff's injury. Accordingly, the City's request to dismiss Plaintiff's state law negligence claims is hereby DENIED.

#### C. Plaintiff's Motion for Partial Summary Judgment

Plaintiff argues that Defendants are liable, as a matter of law, for violating his Fourth Amendment rights because Officer Clift unreasonably seized him by walking into the path of the vehicle, in which he was a passenger, and then pointing a gun at the car in an effort to stop it before firing three times. (Pl.'s Mot. 1 (Dkt. No. 190).) The Court has already determined that by shooting Plaintiff, Clift "seized" Plaintiff for purposes of the Fourth Amendment. (Sept. 22 Order 7-8 (Dkt. No. 156).) Viewed in Plaintiff's favor, the Court also found that the evidence sufficiently showed that Clift's use of deadly force was unreasonable in violation of the Fourth Amendment. [FN7] (Id. at 8.) The Court noted, however, that material facts remained in dispute as to whether Clift was in danger at the time he fired his gun. (Id.) Plaintiff's motion recognizes this dispute, and therefore does not seek a determination that Clift's use of deadly force was objectively unreasonable as a matter of law (See Pl.'s Mot. 8 (Dkt. No. 190).) Instead, Plaintiff argues that Clift's use of deadly force "was the proximate and foreseeable result of the unreasonable seizure attempt that *preceded it*." (Id. (emphasis added).) On that basis, Plaintiff contends summary judgment is warranted because Clift acted unreasonably in creating the situation that might otherwise have justified the use of deadly force. (Id. at 9-11.)

FN7. These determinations were affirmed by the Ninth Circuit on appeal. (Mandate 6-7 (Dkt. No. 179-2) (finding that "by shooting Tubar, Clift seized Tubar for purposes of the Fourth Amendment") ("Tubar produced enough evidence to show that Clift's use of deadly force amounted to a violation of his Fourth Amendment Rights".).)

\*9 A seizure is "the intentional acquisition of physical control" by a government actor, and it occurs "when there is a governmental termination of freedom of movement *through means intentionally applied.*" Brower v. County of Inyo, 489 U.S. 593, 596-97, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989). Thus, "apprehension by the use of deadly force is a seizure subject to the reasonableness requirements of the Fourth Amendment." Tennessee v. Garner, 471 U.S. 1, 7, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). The Fourth Amendment test examines whether the force used in a seizure was "objectively reasonable." Graham v. Connor, 490 U.S. 386, 388, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). This calculus "requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake ." Id. at 396 (internal quotations omitted). The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Id. The reasonableness inquiry is objective and does not take into account the officer's "underlying intent or motivation." Id. at 397.

Plaintiff's motion asks the Court to find that Officer Clift's conduct prior to the shooting was unreasonable as a matter of law, and thereby constituted an independent Fourth Amendment violation. Plaintiff relies, almost exclusively, on Alexander v. City and County of San Francisco, 29 F.3d 1355 (9th Cir.2004). Since Alexander, however, the Ninth Circuit has carefully explained and limited its reach. See Billington v. Smith, 292 F.3d 1177, 1188-91 (9th Cir.2002). Alexander holds that "where an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force." Billington, 292 F.3d at 1189. The determination of whether an officer's provocation is intentional or reckless "must be kept within the Fourth Amendment's objective reason-

ableness standard." Id. at 1190. Thus, a plaintiff may establish liability by demonstrating that an officer's provocative actions are objectively unreasonable under the Fourth Amendment. Id.

To prevail on his theory for summary judgment, Plaintiff must establish that Clift intentionally or recklessly provoked a violent response, *and* such provocation was an independent constitutional violation, i.e., it was objectively unreasonable. See id. Viewing the evidence in the light most favorable to Defendants and drawing reasonable inferences in their favor, Anderson, 477 U.S. at 248-50, the Court finds that Plaintiff has failed to meet his burden on either element. As the parties' pleadings readily demonstrate, significant factual disputes remain as to (1) whether Clift placed himself in front of the car or tried to block its path with his body, (2) whether the car turned toward Clift, and (3) whether Clift's positioning created the danger, or perceived danger, that precipitated the shooting. [FN8] The determination of whether Clift "intentionally or recklessly provok[ed] a violent confrontation" necessarily requires a resolution of the factual disputes regarding Clift's exact positioning relative to the car's travel prior to his use of deadly force. On the one hand, if the factfinder determines that Clift intentionally attempted to block or stop the car by positioning his body in its direct path of travel, then he may have recklessly provoked the subsequent dangerous situation. [FN9] On the other hand, if Clift was positioned beyond the car's path of travel and the car then turned toward Clift, then he likely did not recklessly create the need to use defensive deadly force. See Billington, 292 F.3d at 1189-90. Moreover, these factual disputes preclude a finding that Clift's conduct prior to the shooting was objectively unreasonable as a matter of law. See id. at 1190 ("[I]f a police officer's conduct provokes a violent response ... but is objectively reasonable under the Fourth Amendment, the officer cannot be held liable for the consequences of that provocation regardless of the officer's subjective intent or motive."). The Court cannot resolve these factual disputes at the summary judgment stage.

FN8. The bulk of each brief on this motion is dedicated to discussing, dissecting, and arguing over the factual circumstances surrounding the shooting. (See Pl.'s Mot. 1-8 (Dkt. No. 190); Resp. 1- 12 (Dkt. No. 205); Reply 1-4 (Dkt. No. 219).) Each party points

to some evidence that supports their version of how the events unfolded.

(W.D.Wash.)

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FN9. Of course, if the factfinder determines that Clift's use of deadly force itself was unreasonable because he was not in imminent danger, then it will be unnecessary to examine his prior conduct.

\*10 Plaintiff argues that Clift's initial decision to move from a position of safety into the parking lot and the eventual path of the vehicle was *ipso facto* an intentional, unconstitutional provocation. (Pl.'s Mot. 11 (Dkt. No. 190).) Regardless of Clift's exact position, Plaintiff asserts it is undisputed that Clift deliberately positioned himself somewhere in between the vehicle and the exit before he started shooting. (*Id.* at 4.) A Fourth Amendment violation, however, is not established based merely on "bad tactics that result in a deadly confrontation that could have been avoided." Billington, 292 F.3d at 1190. *Id.* And, "the fact that an officer negligently got himself into a dangerous situation will not make it unreasonable for him to use force to defend himself." *Id.* Clift's decision to approach the stolen vehicle in an attempt to arrest its occupants and then backpedal through the parking lot once the vehicle began moving, may have been a bad tactical decision or even negligent. But the Court cannot employ 20/20 hindsight to find that these decisions effected an unconstitutional provocation as a matter of law. *See id.* at 1191 (finding that the list of tactical errors supplied by plaintiff's expert was nothing more than "20/20 hindsight"). In sum, Plaintiff has not met his burden of demonstrating that Clift intentionally or recklessly provoked a violent response, and such provocation was an independent constitutional violation. Accordingly, partial summary judgment that Defendants are liable for unreasonable seizure is not appropriate.

### III. CONCLUSION

For the foregoing reasons, Defendant City of Kent's Motion for Partial Summary Judgment (Dkt. No. 188) is hereby DENIED, and Plaintiff's Motion for Partial Summary Judgment (Dkt. No. 190) is hereby DENIED.

SO ORDERED this 4th day of December, 2008.

Not Reported in F.Supp.2d, 2008 WL 5142932